STATE OF MICHIGAN

COURT OF APPEALS

STATE FARM FIRE AND CASUALTY COMPANY, Plaintiff-Appellant, v DR. MICHAEL KAPRAUN and KAPRAUN, P.C., Defendants-Appellees.	UNPUBLISHED July 3, 2014 No. 310564 Genesee Circuit Court LC No. 10-094869-CK

Before: O'CONNELL, P.J., and WILDER and METER, JJ.

PER CURIAM.

Plaintiff appeals as of right from an opinion and order denying its motion for summary disposition and ordering plaintiff to defend and indemnify defendants. Plaintiff argues that it has no duty to defend or indemnify defendants in an Illinois state court class-action lawsuit alleging conversion and violations of the federal Telephone Consumer Protection Act (TCPA). See 47 USC 227. We affirm.

STANDARD OF REVIEW AND LEGAL PRINCIPLES

This Court reviews de novo questions of insurance-contract interpretation. *Morley v Auto Club of Mich*, 458 Mich 459, 465; 581 NW2d 237 (1998). This Court also reviews de novo the grant or denial of a motion for summary disposition under MCR 2.116(C)(10). *Lakeview Commons LP v Empower Yourself, LLC*, 290 Mich App 503, 506; 802 NW2d 712 (2010). A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim, and is reviewed by considering the pleadings, admissions and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Id.* "Summary disposition is proper if there is 'no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.' There is a genuine issue of material fact when 'reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party.'" *Id.* (citations omitted).

"An insurance company has a duty to defend its insured if the allegations of the underlying suit arguably fall within the coverage of the policy . . . ." *Citizens Ins Co v Secura Ins*, 279 Mich App 69, 74; 755 NW2d 563 (2008) (internal quotation marks and citations omitted). "An insurer's duty to defend is broader than its duty to indemnify." *Id.* "The duty to

defend does not depend upon [the] insurer's liability to pay." *Id*. at 76 (internal quotation marks and citation omitted). An insurer's duty to defend is based on the allegations in the third party's complaint against the insured. *Id*. at 74. "The duty to defend cannot be limited by the precise language of the pleadings." *Id*. at 75 (internal quotation marks and citations omitted). "This duty is not limited to meritorious suits and may even extend to actions which are groundless, false, or fraudulent, so long as the allegations against the insured *even arguably* come within the policy coverage." *Id*. at 74-75 (internal quotation marks and citations omitted; emphasis in the original).

"In determining whether there is a duty to defend, courts are guided by established principles of contract construction." *Id*. at 74.

> The language of insurance contracts should be read as a whole and must be construed to give effect to every word, clause, and phrase. When the policy language is clear, a court must enforce the specific language of the contract. However, if an ambiguity exists, it should be construed against the insurer. An insurance contract is ambiguous if its provisions are subject to more than one meaning. An insurance contract is not ambiguous merely because a term is not defined in the contract. Any terms not defined in the contract should be given their plain and ordinary meaning, which may be determined by consulting dictionaries. [*McGrath v Allstate Ins Co*, 290 Mich App 434, 439; 802 NW2d 619 (2010) (citations omitted).]

A court should grant summary disposition to a party "if a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts . . . ." *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). "[L]egal terms of art are to be construed according to their peculiar and appropriate meaning." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 427; 751 NW2d 8 (2008); MCL 8.3a. "In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor." *Citizens Ins Co*, 279 Mich App at 75 (internal quotation marks and citations omitted).

BODILY INJURY, PERSONAL INJURY, AND ADVERTISING INJURY

The facts underlying the present appeal involve the alleged sending, by a company hired by defendants, of numerous facsimiles advertising a food-supplement drink. Plaintiff contends that it has no duty to defend or indemnify based on the sending of these facsimiles.

The insurance policy refers to bodily and personal injury, in relevant part, as follows:

> 3. **bodily injury** means **bodily injury**, sickness or disease sustained by a person, including death resulting from the **bodily injury**, sickness or disease at any time;
>
> * * *
>
> 11. **personal injury** means injury, other than **bodily injury,** arising out of one or more of the following offenses:

* * *

> d. oral or written publication of material that violates a person's right of privacy. . . .

This insurance applies only:

> 2. to **personal injury** caused by an **occurrence** committed in the **coverage territory** during the policy period. The **occurrence** must arise out of the conduct of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you . . . .

Plaintiff has no duty to defend or indemnify defendants based on personal or bodily injury. The Illinois class-action complaint only alleges property damage and violations of the TCPA resulting from defendants' advertising. Therefore, the complaint does not implicate bodily injury, and any potential personal injury was not caused by an occurrence, because the policy expressly excludes coverage for advertising done by or on behalf of the business.

The insurance policy defines advertising injury as an injury arising from:

> a. oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
>
> b. oral or written publication of material that violates a person's right of privacy;
>
> c. misappropriation of advertising ideas or style of doing business; or
>
> d. infringement of copyright, title or slogan.

Plaintiff has a duty to defend and indemnify defendants in the Illinois class-action lawsuit pursuant to the definition of advertising injury. The injuries alleged in the complaint arguably fall within the advertising-injury coverage. See *id*. at 75. The insurance policy's definition of advertising injury is ambiguous and is therefore construed against plaintiff. *McGrath*, 290 Mich App at 439.

Plaintiff argues that the phrase "right of privacy" should be limited to the context of Michigan tort law and, further, should only encompass a person's right to secrecy. However, these limitations are not implicated by the context or wording of the phrase. The insurance policy defines the coverage area as the entire United States. Therefore, it is inaccurate to focus narrowly on tort law from this state. Moreover, nothing in the policy indicates that the phrase "right of privacy" does not encompass the right of privacy as defined by federal laws or other sources. In fact, the policy's definition of advertising injury specifically references another potential violation of federal law: copyright law. Further, the United States Congress, in enacting the TCPA, believed that the right to be left alone is included in the right of privacy. *Ashland Hosp Corp v Serv Employees Intern Union, Dist 1199 WV/KY/OH*, 708 F3d 737, 743 (CA 6, 2013). See also 77 CJS Right of Privacy and Publicity § 1.

Plaintiff impliedly argues that "the rule of the last antecedent" forces this Court to interpret the phrase "violates a person's right of privacy" to modify only the term "material." "[The rule of the last antecedent] is a common grammatical rule of construction that a modifying clause will be construed to modify only the last antecedent unless some language in the statute requires a different interpretation." *Adell Broad v Apex Media Sales*, 269 Mich App 6, 10; 708 NW2d 778 (2005). However, the last antecedent can be a word or a clause. *Stanton v Battle Creek*, 466 Mich 611, 616; 647 NW2d 508 (2002). Therefore, the phrase "violates a person's right of privacy" could be viewed as modifying either the clause "oral or written publication of material" or just the word "material" as the last antecedent.

Plaintiff contends that the crux of the other definitions of advertising injury is the content of the advertisement, rather than its form of transmission, and that, therefore, only the content should be considered. However, plaintiff does not support this theory with any case law. Further, this is not the only reasonable construction. Another viable theory of construction is that plaintiff grouped all similar things together in a subsection. For example, using identical introductory language but separating subsections (a) and (b) implies that plaintiff meant to distinguish subsection (b) from the content-based language in subsection (a). The policy language does not clearly indicate that the parties intended that advertising injury be limited to injury from the content of the advertisement.

Plaintiff contends that the word "publication" implies that the section should be interpreted as covering only secrecy violations, involving private information that has been publicized. However, Black's Law Dictionary (9th ed) recognizes that "publication" encompasses "the act of declaring or announcing to the public," and in defining "publish," it includes the phrase "[t]o distribute copies (of a work) to the public." Transmitting facsimiles arguably falls within these definitions.

We construe the language in question in defendants' favor and thus find a duty to defend and indemnify.

PROPERTY DAMAGE

Plaintiff argues that it does not have a duty to defend against the conversion or property damage claims because (1) the acts did not cause property damage and (2) even if they did, coverage is precluded under the "expected or intended" damage clause. The ink and paper used to print the facsimiles constituted property damage as defined by the insurance policy. The insurance policy defines property damage as "physical injury to or destruction of tangible property, including all resulting loss of use of that property." The facsimiles resulted in the loss of use of the paper and ink used to print them. However, we agree that coverage for the property damage is excluded under the "expected or intended" damage clause. Indeed, defendants intentionally sent the facsimiles, and due to the nature of a facsimile machine using paper and ink, defendants must have intended the consequences. On the other hand, plaintiff still has a duty to defend against the property damage and conversion claims. "An insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy." *Citizens Ins Co*, 279 Mich App at 75 (internal quotation marks and citations omitted). Plaintiff's obligation to defend defendants as discussed above obligates it to defend the conversion and property damage claims.

PUBLIC POLICY

Plaintiff argues that it is against public policy and Congress's intent for plaintiff to defend and indemnify defendants. Without an intentional violation of the TCPA, this argument is unpersuasive. Two of the cases plaintiff cites for this proposition, *United Gratiot Furniture Mart, Inc v Mich Basic Prop Ins Ass'n*, 159 Mich App 94, 98; 406 NW2d 239 (1987), and *K & T Enterprises, Inc v Zurich Ins Co*, 97 F3d 171, 178 (CA 6, 1996), relate to arson, a serious, potentially deadly crime. Also, as plaintiff points out, the "wrongful conduct" rule is generally used in tort cases, rather than insurance-contract cases. See, e.g., *Hashem v Les Stanford Oldsmobile, Inc*, 266 Mich App 61, 88-89; 697 NW2d 558 (2005). There *is* a valid public-policy argument that courts should not encourage illegal activities. *Id*. However, courts rarely make public-policy exceptions. See *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003) (discussing "highly unusual" circumstances). Plaintiff was free, as the drafter of the policy, to exclude coverage for damages arising out of violations of the TCPA. See, generally, *id*.

We note that it is only *alleged* that defendants "willfully or knowingly" violated the TCPA and are subject to treble damages under 47 USC 227. We refuse to abrogate the duty to defend based on a hypothetical situation. As far as the duty to indemnify for an intentional violation of the TCPA, we emphasize that the Illinois court has not determined whether defendants willfully or knowingly violated the law, and therefore this specific issue is not ripe for review.[1]

Affirmed.

/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter

[1] "A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *City of Huntington Woods v Detroit*, 279 Mich App 603, 615-616; 761 NW2d 127 (2008) (internal quotation marks and citation omitted).